Supreme Court, U.S.
FILED

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04-125 MAY 24 2004

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IN THE

Supreme Court of the United States

George E. Kersey,

Petitioner

v.

The Supreme Court of New Hampshire

On Petition for a Writ of Certiorari
to the Supreme Court of New Hampshire

PETITION FOR A WRIT OF CERTIORARI

George E. Kersey
Petitioner
P.O. Box 1073
Framingham, MA 01701
(781) 581-5103

Dated: May 23, 2004

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER a New Hampshire attorney should be disbarred by the Supreme Court of New Hampshire because, while Being wrongly suspended by the State of New Hampshire for three months, he **challenged** an Order to turn over files of the attorney for cases where the Courts of the State of New Hampshire **did not have jurisdiction?**

2. WHETHER, notwithstanding a lack of jurisdiction by the State of New Hampshire to order a turn over of files, the **turnover** by an attorney of files **under protest** is a mitigating factor against disbarment?

3. WHETHER, it is a further ground for disbarment that a New Hampshire attorney appealed a case where **attorney's fees** were awarded against the attorney **personally** by a lower court even though the lower court ruled it did **not have jurisdiction**

4. WHETHER an attorney has been deprived of substantive and procedural **due process** by being disbarred because a court ignores its lack of jurisdiction to order a turn over of files where New Hampshire does not have jurisdiction, and the attorney turns over the files under protest

5. WHETHER an attorney has been deprived of **equal protection** by the imposition of disparate discipline and punishing the attorney for challenging an order, and complying under protest, with an order to turn over files where the court does not have jurisdiction, and for appealing a case where fees were awarded against the attorney personally

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LIST OF ALL PARTIES

GEORGE E. KERSEY, Petitioner

JAMES L. DEHART, Respondent for the Committee on Professional Conduct of the State of New Hampshire

CITATION OF THE OFFICIAL REPORT OF THE OPINION ENTERED IN THE CASE

This case is No. LD-2002-006 of the Supreme Court of the State of New Hampshire and is reproduced in full in the Appendix to this Petition for Certiorari

JURISDICTION

This Court has jurisdiction over the judgment of the Supreme Court of the State of New Hampshire by virtue of Title 28 U.S.C. § 1254

THE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Constitution, Amendment 5 and 14
28 U.S.C. § 1254

BEST AVAILABLE COPY

STATEMENT OF THE CASE SETTING OUT THE MATERIAL FACTS

Petitioner Kersey, an attorney admitted to practice in Massachusetts and New Hampshire, was wrongly suspended by Massachusetts for three months in **violation** of its rule that **disparate discipline** should not be imposed. In the case most like Kersey's, a private reprimand had been imposed. Massachusetts made a **false finding of fact** that Kersey had not attempted to comply with a contempt order in a **matrimonial dispute** in Vermont where Kersey was not admitted to practice. New Hampshire then brought an action for **reciprocal discipline** in which Kersey pointed out that, contrary to the position taken by Massachusetts, he had substantially complied, and Kersey provided New Hampshire with **proof** of his substantial compliance with the Vermont order. New Hampshire nevertheless imposed the **same discipline** as Massachusetts, a three months suspension and ordered Kersey to turn over his client files and trust accounts to another New Hampshire attorney. Kersey advised the New Hampshire attorney that Kersey had **no active New Hampshire state cases** and no New Hampshire trust accounts, so Kersey believed there was nothing to turn over. Indeed Kersey's **only** New Hampshire state case had been dismissed for lack of jurisdiction and **attorneys' fees were awarded** against Kersey **personally** for bringing a case where New Hampshire lacked jurisdiction. Because attorneys' fees were awarded against Kersey personally, Kersey appealed the award of attorneys' fees to the New Hampshire Supreme Court, but that court refused to take the case. Because Kersey had appealed the case where attorneys' fees were awarded against him personally and because he challenged the order to turn over files where the State of New Hampshire has no jurisdiction, Kersey was found in contempt and the matter was referred to the New Hampshire Profes-

sional Conduct Committee for disbarment. On February 27, 2004 the New Hampshire Supreme Court granted the petition of the Professional Conduct Committee and ordered disbarment because Kersey had challenged the order to turn over files where the State of New Hampshire did not have jurisdiction, ignoring the fact the Kersey had turned over the files under protest, and because Kersey had appealed his only New Hampshire case where attorneys' fee were awarded against him personally.

DIRECT AND CONCISE ARGUMENT

Under the law of Massachusetts **disparate discipline** is not to be imposed in attorney discipline cases, as stated in Case No. SJC-08137 of the Supreme Judicial Court of the Commonwealth of Massachusetts on August 15, 2000. Yet in that case Massachusetts made a false finding of fact that Kersey had not, by contrast with *Private Reprimand PR-92-37*, 8 Mass Atty Disc. R. 334 (1992), attempted to satisfy a Vermont contempt order in a matrimonial case where Kersey was not admitted to practice. Instead of a private reprimand that would have been consistent with *Private Reprimand PR-92-3*, *supra,* Massachusetts imposed a three-month suspension. Following the Massachusetts suspension, New Hampshire, despite the showing by Kersey that he had substantially complied with the Vermont contempt order so that the correct Massachusetts discipline should have been a private reprimand to be consistent with **due process** and **equal protection**, imposed a three-months suspension and ordered Kersey to turn over his client files and trust accounts to another New Hampshire attorney. Although Kersey advised the New Hampshire attorney that he had no New Hampshire trust accounts and no active New Hampshire cases, the New Hampshire Supreme Court found Kersey in contempt for disputing the

order to turn over cases where the State of New Hampshire had no jurisdiction and for appealing a case in New Hampshire where the lower court had awarded attorneys fees against Kersey personally for bring a case in New Hampshire where the lower court ruled it had no jurisdiction. It is an established principle of law that a challenge to the jurisdiction of a court may be made at any time. Kersey advised the New Hampshire attorney that was assigned to take over Kersey's cases that Kersey had no New Hampshire trust accounts and no active New Hampshire cases. Indeed the only New Hampshire case that Kersey had was dismissed for lack of jurisdiction. When the assigned New Hampshire attorney contacted the client of that case, the client advised the New Hampshire attorney that he did not need his assistance since the case could not be brought in New Hampshire. The New Hampshire attorney then said he had contacts that could bring the case in Massachusetts, but that offer was declined. Why should Kersey be disciplined for challenging an order to turn over a file where a non-New Hampshire client does not want the assistance of a New Hampshire attorney who wanted to take over the file of that client? Kersey's only other relevant cases were in the United States District Court for the District of New Hampshire, which is a separate jurisdiction from the State of New Hampshire and has its own rules for dealing with attorney discipline. Why should Kersey be disciplined by a State Court for challenging an order to turn over files for cases in the Federal District Court? In any event, although Kersey challenged the order to turn over files where there was no jurisdiction, **he did turn over the files under protest**. Even if Kersey was in contempt for challenging the order, it is not seen how any such contempt was not purged by the act of complying with the order under protest and turning over the disputed files, which Kersey did. Finally in the case where Kersey is accused of practicing law while under suspension, that is a case where, before the imposition of a wrongful reciprocal suspension, the case was dis-

missed by a lower court in New Hampshire for lack of jurisdiction, but attorney fees were awarded against Kersey personally, and Kersey made an appeal that was denied against the award of attorneys' fees against him personally. The law is believed clear that in the case of an award of attorneys fees against an attorney personally, only the attorney, and not the client, has the authority to challenge the personal award of attorneys fees with the consequence that Kersey was not practicing law for the client but for himself personally. Accordingly, Kersey did not engage in any improper practice of law and should not be punished for challenging an order to turn over files for which there is a legitimate basis for challenging jurisdiction, and there was compliance under protest

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Certiorari has been served by first class United States mail this ___ day of May on James L. DeHart, Respondent for the Committee on Professional Conduct, State of New Hampshire.

_____
George E. Kersey

APPENDIX CONTAINING THE OPINION ENTERED IN CONJUNCTION WITH THE JUDGMENT SOUGHT TO BE REVIEWED.....

No. LD-2002-006, KERSEY'S CASE

Argued: January 15, 2004

Opinion Issued: February 27, 2004

THE SUPREME COURT OF NEW HAMPSHIRE

Original

No. LD-2002-006

KERSEY'S CASE

Argued: January 15, 2004

Opinion Issued: February 27, 2004

James L. DeHart, of Concord, by brief and orally, for the committee on professional conduct.

George E. Kersey, by brief and orally, pro se.

Duggan, J. In September 2002, the Committee on Professional Conduct (committee) petitioned this court to disbar the respondent, George E. Kersey. We referred the petition to a Judicial Referee (Gray, J.) who held a hearing and found, by clear and convincing evidence, that the respondent was in contempt of this court and had violated New Hampshire Rules of Professional Conduct 3.4(c) and 5.5(a). The referee recommended disbarment. In 1991, the respondent was found to be in contempt of court in Vermont for willful violations of court orders. In September 1999, based upon the Vermont contempt order, the respondent's license to practice law in Massachusetts was suspended for three months and until he purged himself of the contempt. On September 20, 2001, on a petition for reciprocal discipline, we suspended the respondent from

the practice of law in New Hampshire for a period of three months. On September 20, 2001, and again on December 19, 2001, the respondent was ordered to turn over his client files and trust accounts. On May 6, 2002, because he continued to practice law and refused to comply with the court orders to turn over his files, we held the respondent in contempt and referred the matter to the committee for proceedings concerning the appropriate sanction. Kersey's Case, 147 N.H. 659 (2002).

"This court has inherent authority as well as statutory authority to discipline attorneys." Wehringer's Case, 130 N.H. 707, 718 (1988). Attorney conduct that violates the Rules of Professional Conduct is grounds for discipline. Sup. Ct. R. 37 (1)(b) (amended 2003). "Disciplinary action is not taken as a mode of inflicting punishment for an offense." Shillen's Case, 149 N.H. 132, 139 (2003) (quotation omitted). Rather, "[t]he purpose of the court's disciplinary power is to protect the public, maintain public confidence in the bar, and preserve the integrity of the legal profession, and to prevent similar conduct in the future." Id. (quotation and ellipsis omitted). "We retain the ultimate authority to determine the appropriate sanction for a violation of the rules governing attorney conduct." Id. (quotation omitted). "In professional conduct matters, although we defer to the referee's factual findings if supported by the record, we retain the ultimate authority to determine whether, on the facts found, a violation of the rules governing attorney conduct has occurred and, if so, the appropriate sanction." Id. at 136 (quotation omitted). "We review the findings made by the referee to determine whether a reasonable person could reach the same conclusion as the referee based upon the evidence presented." Id. (quotation omitted). Here, the referee recommended that the respondent be disbarred for being in contempt of court and for violting the New Hampshire Rules of Professional Conduct.First, as we previously determined in Kersey's Case, 147 N.H. at 663, the respondent violated this court's orders and was held in contempt of court.

Second, the referee found, and we agree, that the respondent's conduct also violated New Hampshire Rules of Professional Conduct 3.4(c) and 5.5(a). Rule 3.4(c) provides that: "A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." As we found in Kersey's Case, 147 N.H. at 662, the respondent "willful[ly] and blatant[ly]" disregarded our orders to turn over his client files. This conduct violated Rule 3.4(c).

Rule 5.5(a) provides that: "A lawyer shall not practice law in a United States jurisdiction where doing so violates the regulation of the legal profession in that United States jurisdiction." As we found in Kersey's Case, 147 N.H. at 662, the respondent continued to practice law, despite his suspension, when he filed two pleadings with this court in an unrelated matter. This conduct violated Rule 5.5(a).

The respondent makes numerous arguments concerning the validity of his Massachusetts suspension, his justification for not turning over the files and the validity of this court's contempt orders. To the extent these arguments are intended to challenge our prior contempt findings, we addressed them in Kersey's Case, 147 N.H. at 662, and will not revisit them now. The contempt findings are final and not the issue before us. Thus, the only remaining issue before us is the appropriate sanction to be imposed. The committee argues that disbarment is the appropriate sanction to be imposed. We agree.

In determining the appropriate sanction, we have often relied upon the ABA Standards for Imposing Lawyer Sanctions (1991) (Standards), for guidance. See, e.g., Feld's Case, 149 N.H. 19, 28 (2002), cert. denied, 124 S. Ct. 67 (2003); Shillen's Case, 149 N.H. at 139. The Standards set forth the following factors a court should consider in imposing sanctions: "(a) the duty violated; (b) the lawyer's mental state;

(c) the actual or potential injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." Standards, supra § 3.0, at 25. Section 8.0 of the Standards addresses the appropriate sanction to be imposed, based upon the application of these factors, when a lawyer violates the terms of prior disciplinary orders. Id. § 8.0, at 47. According to Section 8.1: Disbarment is generally appropriate when a lawyer: (a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or (b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession. Id. § 8.1, at 47. The commentary further notes that the most common case involving disbarment and violations of prior discipline orders "is one where a lawyer has been suspended but, nevertheless, practices law." Id. We note that RSA 311:8 (Supp. 2003) provides that: "The supreme court shall inquire . . . into any charges of . . . contempt of court against an attorney, and, upon satisfactory evidence of the attorney's guilt, shall suspend such attorney from practice, or may remove the attorney from office." Thus, the legislature has also identified disbarment as an appropriate sanction for a lawyer who has been found in contempt of court. Before we determine what disciplinary action we will take, we must also consider mitigating factors. See Wehringer's Case, 130 N.H. at 721. The respondent asserts that the fact that he surrendered the client files under protest was a mitigating factor. We disagree. Cf. Standards, supra § 9.4(a), at 51 (listing forced or compelled restitution as a factor that is not aggravating or mitigating). The respondent asserts that another mitigating factor was his belief that the court did not have jurisdiction over the files, and thus he was not required to surrender the files. We find that this is not a mitigating factor because, as we previously stated, "[t]he specific language of the December order belies the respondent's contention that he reasonably

believed he was not required to surrender his client files. Kersey's Case, 147 N.H. at 662-63. Accordingly, we conclude that there are no mitigating factors in this case. The respondent was originally subject to disciplinary action because he was held in contempt of court in Vermont. He was later found to be in contempt of this court for twice violating orders requiring him to turn over client files and for practicing law after being suspended. Id. In sum, the respondent was in contempt of court in his disciplinary case, which itself was based on contempt findings. The referee found, and we agree, that the respondent's conduct "is reflective not only of his contempt for the court issuing such orders but for the entire judicial system as a whole. Such conduct cannot be overlooked or treated in any manner other than . . . [by] disbarment from the practice of law." Accordingly, the respondent is hereby disbarred and is ordered to reimburse the committee for all of its expenses, including legal fees, incurred in investigating and prosecuting this matter. See Sup. Ct. R. 37 (16) (amended 2003).

So ordered.

NADEAU and DALIANIS, JJ., concurred.